80-1873

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No. _____

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1980

DOUGLAS E. FRANK and MICHAEL H. FOLB,

Petitioners,

v.

UNITED STATES TRUST COMPANY OF NEW YORK, and LAVENTHOL, KREKSTEIN, HORWATH and HORWATH,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI - SECURITIES CLAIM

DUSHOFF & SACKS

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QUESTIONS PRESENTED:

1. Did the Ninth Circuit Court of Appeals err in holding that there is a right to contribution under federal law, against defendants who have entered into a court-approved settlement of a federal securities law class action?

2. Did the Ninth Circuit Court of Appeals err in holding that there is a right to contribution against control persons in federal securities actions?

3. Did the Ninth Circuit Court of Appeals err in holding that there may be a right to indemnity against settling defendants under the laws of the States of New York and Arizona?

No. _____

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OPINIONS BELOW:

The decision of the United States District Court, District of Arizona (Appendix A, pages 1-3) is unreported. The opinion of the United States Court of Appeals, Ninth Circuit, will be reported in _____ F.2d _____ (9th Cir. 1980), rehearing denied _____ F.2d _____ (9th Cir. 1981).

JURISDICTION:

The opinion sought to be reviewed was entered by the United States Court of Appeals for the Ninth Circuit, on December 22, 1980. The order denying petitioners' Petition for Rehearing was entered February 18, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED:

The pertinent provisions of the statutes involved are set forth in Appendix B hereto. Specifically, those statutes are: 15 U.S.C. §§ 77k, 771, 77o, 77q

(Securities Act of 1933, Sections 11, 12, 15 and 17); 15 U.S.C. § 78j (Securities Exchange Act of 1934, § 10); Rule 10b-5, Rules of the Securities and Exchange Commission; and § 15-108, General Obligations Law (McKinney's Consolidated Laws of New York).

STATEMENT OF THE CASE:

The action in chief was commenced on August 2, 1974, by Jay Herman, a limited partner of Western Properties Limited Partnership, and was denominated a class action. For purposes of this appeal, the pertinent claims made by plaintiff concerned the Securities Act of 1933 (15 U.S.C. §§ 77a-77bbbb), and, specifically, §§ 77k, l, and q thereunder; the Securities Exchange Act of 1934 (15 U.S.C. §§ 78a-78lll), and, specifically, § 78j and Rule 10b-5 thereunder; and a common

law claim for breach of trust and fiduciary duty.[1]

Named as defendants in the action were Western Properties Limited Partnership, Doug Frank Development Corporation (the corporate general partner of Western Properties Limited Partnership), various officers and directors of DFDC, including petitioners Frank and Folb, and respondents Laventhol and U. S. Trust.

Respondent Laventhol filed a cross claim seeking indemnity and contribution against, inter alia, petitioners.

Thereafter, seven of the nine officers and directors of DFDC (i.e., all but Frank and Folb) moved for and were

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[1] Federal jurisdiction in the court of the first instance was premised upon 15 U.S.C. §§ 77v, and 15 U.S.C. § 78aa.

granted summary judgment on all claims asserted against them by plaintiff. In December, 1976, plaintiff entered into a proposed settlement agreement with the remaining parties defendant (WPLP, DFDC, Frank and Folb). A copy of the settlement agreement, setting forth its terms, appears at Appendix A, pages 4-9.

The motion papers in support of this settlement agreement noted that the settlement agreement had been entered into after it was determined by plaintiff that the settling defendants could not respond to any significant extent in damages should judgment be entered against them. Notice of the proposed settlement was sent to class members and all defendants. Only one out of 95 class members opposed the proposed settlement. This opposition was based solely on the ground that the class member wished to opt out of the suit entirely. Laventhol, however, attacked

the settlement agreement as being unfair and unreasonable. U. S. Trust took the position that the form of the notice of settlement was inadequate and that, if the court approved the settlement, class members should be given an additional opportunity to opt out of the suit.

Five days before the hearing respecting the fairness of the proposed settlement agreement, U. S. Trust moved for permission to file a cross claim against Frank and Folb, seeking contribution and indemnity. Permission was granted.

After court hearings directed to the issue of fairness (which hearings were held on March 21 and March 28, 1977), the district court approved the settlement agreement as being fair and reasonable. Appendix A, pages 10-12. Thereafter, Frank and Folb moved for summary judgment on the indemnity and contribution cross

claims of U. S. Trust and Laventhol. On November 7, 1977, the court granted Frank and Folb's motions. Appendix A, pages 1-3.

Both U. S. Trust and Laventhol appealed from the district court determinations.[2]

As to these appeals, the Ninth Circuit affirmed in part and reversed in part, affirming the grant of summary judgment in favor of Frank and Folb as to the indemnity claims under the federal securities laws asserted against them by U. S. Trust and Laventhol, and reversing the summary judgment determination with respect to the contribution claims, under the federal securities laws,

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[2] In the Ninth Circuit, the appeal of U. S. Trust was denominated No. 78-1397, and the appeal of Laventhol, No. 78-1297.

and with respect to indemnity claims under New York and Arizona law. See Appendix A, pages 13-21.

On February 18, 1981, Frank and Folb's petitions for rehearing were denied. See Appendix A, page 22. On March 3, 1981, Frank and Folb's Motion to Stay Issuance of Mandate Pending Application for Writ of Certiorari was granted.

ARGUMENT IN SUPPORT OF THE PETITION FOR CERTIORARI

1. The Court of Appeals Erred in Holding That There is a Right to Contribution Under Federal Law, Against Defendants Who Have Entered Into a Court-Approved Settlement of a Federal Securities Law Class Action.

The principal issue posed by this case has not been addressed by the Supreme Court, has not received consistent

treatment in the circuits, and is an issue of great significance in federal securities litigation. Petitioners believe that the Ninth Circuit has incorrectly decided the issue.

In concluding that contribution lies against settling parties, the circuit court, at Appendix A, page 17, after recognizing "the sometimes conflicting values of settlement and contribution," concludes that the most satisfactory solution of this conflict is to permit contribution from settling parties. This decision overlooks relevant federal authority, and fails to adequately reconcile the legal interests here involved. Resolution of these interests leads persuasively to the conclusion that settlement, under the circumstances of this case, must bar contribution. Permitting contribution in this case serves no recognizable federal or state interest. On the

other hand, a determination that contribution is here barred would fully promote all identifiable policies. This is precisely the conclusion reached by the court in Stratton Group Ltd. v. Sprayregen, 466 F.Supp. 1180, 1189 (n. 11) (S.D.N.Y. 1979), cited in petitioner's Citation of Supplemental Authority, dated June 27, 1980. Stratton was not addressed by the Ninth Circuit in its opinion.

The Stratton court analyzed the issue from a standpoint of federalism. The court there suggested that, in resolving the apparent conflict between contribution and the encouragement of settlement, the appropriate analysis is to determine the policy of the appropriate state concerning contribution, and then to determine whether a contribution action against the settling defendant is consistent with that policy, while at the same time assuring that the federal securities

law policy of deterrence is adequately served.

In Stratton, the New York law of contribution was before the court. The court concluded that "the policy underlying New York's contribution statute is to promote out of court settlement in multiple tort situations."[3] The court tnen concluded that, given that policy, a determination that settlement is a bar to contribution would be appropriate as the only accommodation that would satisfy both federal and state interests.

> "I find these policies [the federal policy of deterrence and the state policy of encouraging settlement] to be fully compatible. As long as the settlement, and concomitant relief, are reasonable and not

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3 See § 15-108, General Obligations Law (McKinney's Consolidated Laws of New York), set out in full in Appendix B. Subsection (b) thereof specifically bars an action for contribution against a tort-feasor who has entered into a good faith settlement with the plaintiff.

> sham, the deterrent effect of the securities law is sufficiently served. In addition, the settlement promotes New York policy at the same time."

The parties to this litigation are in agreement that the only two interested states whose substantive law may come into play are New York and Arizona. The contribution policy of New York, as recognized in Stratton, is to encourage settlement. The same may be said of Arizona, with even greater force. For, under Arizona law, contribution is never permitted to joint tort-feasors. State Farm Mutual Insurance Co. v. Factory Mutual Insurance Co., 22 Ariz. App. 199, 526 P.2d 406, 407 (1974); Chrysler Corp. v. McCarthy, 14 Ariz. App. 536, 484 P.2d 1065, 1067 (1971). Thus, under the Stratton federalism analysis, a good faith settlement (which the district court here specifically found petitioners' settlement with plaintiff class to be) should be

viewed as a bar to an action for contribution, in order to fully accommodate the competing policies of deterrence and settlement. Yet the circuit court's holding completely abandons the latter of these interests.

In suggesting, as it does in its opinion (Appendix A, page 17), that ruling that contribution is unavailable would not serve to "reinforce the deterrent effect of the [securities] statute by preventing one wrongdoer from unjustly escaping loss by shifting its responsibility to another wrongdoer liable for the same payment," the Ninth Circuit fails to take into account a crucial consideration. Petitioners here are not "escaping loss." As part of the settlement - which, it must be emphasized, was wholly satisfactory to the plaintiff class (thus vindicating the rights of the "injured investor" about which the circuit court expressed concern

at Appendix A, page 17), and which was specifically approved by the district court - petitioners agreed to give both monetary and non-monetary consideration to the class. No one required the plaintiff class to accept this settlement. If the plaintiff class believed that this was not a fair resolution of its claims against the petitioners, it would have rejected the settlement and continued to litigate against petitioners. But the class decided - and the district court agreed - that the settlement was fair, and thus the deterrent purpose of the securities laws has been served. Given the Ninth Circuit's conclusion that this is not sufficient to end the litigation as to these petitioners, what possible incentive remains for a securities law defendant to settle with plaintiffs in a multi-defendant case? If the effect of the settlement is simply to enable the settling

parties to offset, in some fashion, the consideration paid in settlement against their total potential liability, why settle? Obviously, there is no settlement incentive under these circumstances.

The court of appeals suggested (Appendix A, page 17) that if petitioners' "settlement with the plaintiff class had resulted in their bearing their proper share of damages, the case might be different." But how is a party interested in settling to determine what is a "proper share of damages?" Upon what basis did the court conclude that "clearly, however, the settlement did not accomplish this" (Appendix A, page 18)? How is it to encourage settlement to tell a settling defendant that, even though the party that sued him has agreed to dismiss him from the lawsuit in return for the payment made, and even though the court has specifically approved that settlement as

fair, he nonetheless may not have bought his peace, because an appellate court might determine that that payment was not his "proper share of damages?"

The court of appeals erred in apparently concluding, solely on the basis of the fact that the $8,000.00 paid in settlement is a small fraction of the total amount claimed by plaintiffs, that petitioners did not bear a proper share of damages. The court thus apparently completely overlooked, among other factors, the financial inability of petitioners to pay a substantially larger judgment and the intangible, non-restorable consideration involved in the settlement. This failure to take such factors into account is squarely inconsistent with other circuit court decisions. See, for example, Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1178 (9th Cir. 1977); City of Detroit v. Grinnell Corp., 495 F.2d 448,

455 (2nd Cir. 1974). It was for plaintiffs to weigh all of the factors involved in determining the fairness of the settlement proposal, and then to accept or reject that proposal as warranted by that evaluation. Having done so, that decision should not now be "second-guessed."[4]

In summary, we believe that all interests militate strongly in favor of giving effect to the settlement reached:

- As shown above, the law of both Arizona and New York support the non-availability of contribution in these circumstances.

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[4] We note that the court of appeals did not address the possibility that plaintiffs might not succeed at trial against the non-settling defendants, and that, under those circumstances, the consideration paid by the settling defendants would be far more than a "proper share," under any standard that might be applied.

- We also note that the federal common law holds that a good faith settlement bars contribution. Gomes v. Broadhurst, 394 F.2d 465, 468 (3rd Cir. 1967); Sabre Shipping Corp. v. American President Lines, 298 F.Supp. 1339, 1346 (S.D.N.Y. 1969); Martello v. Hawley, 300 F.2d 721, 724 (D.C.Cir. 1962).

- Thus, both state and federal law apparently conclude that the promotion of settlement is preferable, and that there is no substantial "unfairness" to the non-settling defendants, since the settling party irrevocably gives up the settlement price, whereas the non-settling party retains the right to prevail completely and pay nothing.

There is simply no reason for the customary application of state and federal law to be ignored just because we are dealing with a securities case. In what fashion will permitting settlement

interfere with the effective enforcement of the securities laws? The reality is that giving effect to the present settlement will promote, not impair, enforcement of the securities laws. As shown above, the "deterrent factor" is not vitiated, since the settling defendants must buy their peace with arms-length plaintiffs. Indeed, there is no better way to maximize the effective enforcement of the securities laws than to permit the plaintiffs to reach accommodations which they believe will maximize their chances of recovery, such as was done in this case. Hence, the fact that this is a securities case argues more strongly, not less strongly, for preferring settlement to contribution.

In sum, we believe this appeal presents an extremely important issue that has been incorrectly decided by the Ninth Circuit and which ought to be addressed by this Court.

2. The Court of Appeals Erred in Holding That There is a Right to Contribution Against Control Persons in Federal Securities Actions.

In reversing the district court's determination that petitioners cannot be held liable in contribution as "control persons," the court of appeals overlooked federal case law precisely on point. For example, the court, in addressing petitioners' argument that a contribution claim does not lie under § 77o against control persons (since that section does not specifically make control persons liable for contribution), dismisses the argument with the statement that "nothing need be said; § 77k(f) has said it all." (Appendix A, page 16.) But 77k(f) does not answer the question of the

availability of contribution against controlling persons. (It simply makes clear that the common law rule against any contribution among joint tort-feasors is inapplicable.) Indeed, "control person" liability is nothing more than statutorily-created additional liability imposed upon certain classes of persons. It does not, in and of itself, satisfy the "jointness" prerequisite to a contribution claim.[5] That is, while an entity which violates the securities laws is directly liable under the Act (and thus could justifiably be held liable in contribution to satisfy the deterrent purposes of the securities laws), a controlling person of that entity may merely be derivatively

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5 That "jointness" is a prerequisite to a contribution claim under the Securities Act, see Herzfeld v. Laventhol, Krekstein, Horwath and Horwath, 540 F.2d 27 (2nd Cir. 1979); Stratton Group, Ltd. v. Sprayregen, supra.

liable (by virtue solely of his "control person" status), and thus not an active participant in the alleged violation. Under these circumstances, there is no joint participation in the wrongdoing by the control person, and it is thus inappropriate to hold that a contribution claim lies against him.

No case authority is cited to support the circuit court's conclusion to the contrary. Indeed, that court failed to take cognizance of the fact that the only authorities speaking to this issue have clearly held that a contribution claim under § 77o does not lie against control persons. See, Shea v. Ungar, CCH Fed. Sec. L. Rep., ¶ 91,558 (S.D.N.Y. 1965); 6 L.Loss, Securities Regulation, at 3930 (n. 415) (Supp. 1969).

3. The Court of Appeals Erred in Holding That There May Be a Right to Indemnity Against Settling Defendants Under the Laws of New York or Arizona.

As noted above, the circuit court recognized that the parties agreed that either New York or Arizona law applies to the pendent state indemnity claims. The parties also recognized in their briefs that, under the law of both states, indemnity applies only in the most limited situations. Those situations involve circumstances where the liability of one party is wholly derivative - that is, where one party has been wholly passive, and his liability thus attaches only by operation of law (for example, where a principal has been held liable for the

tortious acts of his agent). The allegations of plaintiffs' complaint, if established, would result in liability attaching to appellants Laventhol and U. S. Trust on the basis of their own wrongdoing; there is no allegation in the complaint that U. S. Trust and Laventhol's liability is merely derivative of the acts of petitioners. To the contrary, the complaint alleges acts by both of these parties giving rise to independent claims against them. Under these circumstances, it is clear that indemnity does not lie under either New York or Arizona law, and the circuit court erred when it reversed the summary judgment determination on the common law indemnity claims on the basis of Dole v. Dow Chemical Co., 282 N.E.2d 288, 331 N.Y.Supp.2d 381 (1972), and Busy Bee Buffet v. Ferrell, 82 Ariz. 192, 310 P.2d 817 (1957), both of which strictly limit indemnity claims to derivative liability situations.

4. The Significance of the Issues Raised Herein Merits This Court's Consideration of the Petition.

The court of appeals' opinion involves a matter of exceptional importance, dealing with a significant question of federal law which has not been, but should be, settled by the Supreme Court. As noted, that opinion, if not reversed, is likely to signal the death knell for securities law class action settlements involving some but not all defendants. The opinion, in effect, tells a settling defendant that the most he can get from settling the case with plaintiff is a credit, of some measure, against whatever a court later determines to be his appropriate share of liability; and that, despite both plaintiff and the trial court specifically approving the settlement, there can be no assurance that a

defendant has "bought his peace." In short, as explained above, rather than reaching a reasonable accommodation between the opposing tensions of deterrence and settlement, the opinion opts wholly for the former, at the full expense of the latter. In doing so, the opinion (1) ignores the interests of federalism in giving effect to state policies which do not impair overriding federal interests, (2) ignores the federal interest in encouraging settlements, and (3) misapplies the federal policy of encouraging effective enforcement of the securities laws. Given the volume of securities law litigation, which is often time-consuming, complex, and expensive, it is to engage in understatement to say that an opinion that so discourages partial settlement is of exceptional importance.

Based upon all of the foregoing, it is respectfully requested that petitioners' Petition for Writ of Certiorari be granted.

Respectfully submitted this 22 day of April, 1981.

DUSHOFF & SACKS
111 West Monroe, Suite 1518
Phoenix, Arizona 85003

By _____
Seymour Sacks

and

_____
Allan J. Kasen
Attorneys for Petitioners
Douglas E. Frank and
Michael H. Folb

CERTIFICATE OF SERVICE

I, Allan J. Kasen, one of the attorneys for Douglas E. Frank and Michael H. Folb, petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22 day of April, 1981, I deposited in a United States mailbox located at 111 W. Monroe, Phoenix, Arizona, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, an original and 40 copies of the foregoing "Petition for Writ of Certiorari - Securities Claim," and I further certify that three copies of the said document were similarly mailed on said date to each of the following counsel:

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DATED this 22 day of April, 1981.

Allan J. Kasen

APPENDIX

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U.S. District Court
District of Arizona

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

JAY HERMAN, Plaintiff, v. DOUG FRANK DEVELOPMENT CORP., et al., Defendants.	)	NO. CIV-74-803 PHX-WEC J U D G M E N T

WHEREAS cross-defendants Douglas E. Frank and Michael H. Folb on October 7, 1977, filed in this Court Motions for Summary Judgment as against the cross-claims asserted against them by cross-claimants Laventhol, Krekstein, Horwath & Horwath, ("Laventhol") and United States Trust Company of New York ("UST"); and

WHEREAS the said Motions for Summary Judgment came on regularly for hearing on November 7, 1977, cross-defendants being represented by their attorneys Dushoff & Sacks, cross-claimant Laventhol being represented by its attorneys O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, and cross-claimant UST being represented by its attorneys Daughton, Feinstein & Wilson and Carter, Ledyard & Milburn;

The Court, having considered said Motions for Summary Judgment, and the various responses and replies filed in connection therewith, together with the pleadings, interrogatories, affidavits and other matters of record, concludes that there is no genuine issue as to any material fact, and that cross-defendants Douglas E. Frank and Michael H. Folb are therefore entitled to judgment as a matter of law as to the cross-claims asserted

against them by Laventhol and UST; and

WHEREAS this Court has previously entered an order on April 11, 1977, approving the Settlement Agreement entered into between plaintiff and the said cross-defendants settling the claims of plaintiff against cross-defendants.

The Court determines, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, that there is no just reason for delay in the entry of a final judgment in favor of cross-defendants Douglas E. Frank and Michael H. Folb on the cross-claims of Laventhol and UST.

NOW, THEREFORE, IT IS ORDERED ADJUDGED AND DECREED that cross-defendants Douglas E. Frank and Michael H. Folb have judgment against cross-claimants Laventhol and UST on the cross-claims asserted against said cross-defendants by said cross-claimants, and that said cross-defendants be, and the same hereby are,

dismissed from this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there being no just reason for delay the Court expressly directs the entry of this final judgment in favor of the cross-defendants Douglas E. Frank and Michael H. Folb under the provisions of Rule 54(b) of the Federal Rules of Civil Procedure.

DONE IN OPEN COURT this 12th day of November, 1977.

s/ Walter E. Craig
Judge, United States
District Court

COPY OF THE FOREGOING mailed
this 17th day of November, 1977, to:

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s/ Joann Jennings

SETTLEMENT AGREEMENT

THIS AGREEMENT is made and entered into this 6th day of December, 1976, by and between Douglas E. Frank, Michael H. Folb, Doug Frank Development Corporation and Western Properties Limited Partnership (hereinafter "Settling Defendants"), and Jay Herman on behalf of himself and all members of the class which he was appointed to represent as Class Representative by Order of the Court dated October 21, 1975 (hereinafter "Plaintiffs"). This Settlement Agreement is made in reference to the action entitled Jay Herman v. Doug Frank Development Corporation, et al., No. CIV 74-803 PHX WEC (hereinafter "this case" or "this litigation").

In furtherance of this Agreement, the parties hereto make the following statements and representations:

FIRST, Douglas E. Frank and Michael H. Folb make no admission of liability, but have concluded, based upon the experience of the present case, that if they were presently to participate in structuring and arranging a real estate development similar to that of Western Properties Limited Partnership, they would affirmatively state in the prospectus the precise method by which capital contributions are to be drawn down and used by the general partner.

SECOND, Settling Defendants represent that their financial condition is as described in the financial statements to be submitted pursuant to paragraph I(b) of this Agreement and thus prevents Settling Defendants, or any of them, from responding in damages to any meaningful extent in relation to the amount sought in this action.

THEREFORE, in consideration of

the covenants and agreements herein set forth, it is agreed between Plaintiffs and Settling Defendants as follows:

I. To effectuate the Settlement embodied within this Agreement, and upon approval of the Settlement by the Court, Plaintiffs will deliver to Settling Defendants a release of all claims Plaintiffs may have against Douglas E. Frank, Michael H. Folb, and Western Properties Limited Partnership relating to the transactions giving rise to this litigation. In addition, Plaintiffs will deliver to Doug Frank Development Corporation a covenant not to execute upon Doug Frank Development Corporation any judgment Plaintiffs may obtain against Doug Frank Development Corporation in this lawsuit. In consideration therefore, Settling Defendants will perform within a reasonable period of time (to begin immediately upon approval of this Agreement by the Court) as follows:

(a) Messrs. Frank and Folb promise to apply their best efforts in affirmatively assisting Plaintiffs' counsel in the development of Plaintiffs' case, to its conclusion, including discovery of all relevant facts. The promised assistance shall include, but is not limited to, the following:

(i) Messrs. Frank and Folb shall exercise their best efforts in personally searching the files and records of Doug Frank Development Corporation, as well as their personal files and records, and all other files relating to Doug Frank Development Corporation over which Settling Defendants have care, custody or control, to determine whether there are additional documents relevant to Plaintiffs' case. This effort shall include a minimum of 25 hours of their time. Further, these files shall remain open for Plaintiffs' use and inspection during the

pendency of this litigation;

(ii) Messrs. Frank and Folb shall each spend a minimum of 60 hours in informal meetings with Plaintiffs' counsel for the purpose of fully and candidly exploring all facts and circumstances relevant to Plaintiffs' case;

(iii) Messrs. Frank and Folb shall also apply their best efforts in assisting Plaintiffs' counsel in identifying and determining the location of documents which are not presently in their possession, custody or control;

(iv) Mr. Seymour Sacks, attorney for Messrs. Frank and Folb, shall spend a minimum of 25 hours meeting with Plaintiffs' counsel for the purpose of exploring all aspects of this lawsuit;

(v) Messrs. Frank and Folb shall voluntarily submit to such depositions as Plaintiffs' counsel deem

necessary.

(b) Messrs. Frank and Folb and Doug Frank Development Corporation shall submit to Plaintiffs' counsel financial statements prepared according to generally accepted accounting principles and verified (prior to the hearing on the Settlement Agreement) by a Certified Public Accountant of Plaintiffs' designation. These financial statements shall be accompanied by the affidavits of Messrs. Frank and Folb attesting:

(i) to the correctness of such financial statements;

(ii) that all assets, liabilities, and sources of income have been completely and accurately disclosed;

(iii) that since 1972 there have been no transfers of assets to, or for the benefit of, family members, or to other persons or entities;

(c) Douglas E. Frank and

Michael H. Folb (in proportion satisfactory to them) shall pay the Plaintiffs, through Plaintiffs' counsel, for use in defraying costs incurred by the Class Representative, the sum of $8,000 payable as follows:

(i) $2,000 within 30 days after an Order is entered by the Court approving this Settlement. The balance of $6,000 payable in six equal bi-monthly installments thereafter, without interest.

II. It is understood by the parties to this Agreement that the funds to be paid pursuant to paragraph I(c) will, subject to the Court's approval of this Settlement, be used by the Class Representative to defray costs incurred by the Class Representative in this litigation, including but not limited to, the costs of any notice to the class with respect to this Settlement ordered by the

Court pursuant to Rule 23, Federal Rules of Civil Procedure.

III. The parties will join in seeking Court approval of this Settlement pursuant to Rule 23 of the Federal Rules of Civil Procedure. Consummation of this Settlement is subject to and conditioned upon the approval of the Court under Rule 23 and upon the giving of notice under Rule 23(e) of the Federal Rules of Civil Procedure to the members of the class. The parties shall agree, subject to Court approval, to the form of and the appropriate time at which such notice shall be given, or submit the matter to the Court for determination. Subject to the terms of this Agreement, the Court may, after the interested parties have been given notice and opportunity to be heard, make all such determinations and orders as it may deem necessary or proper for the implementation and consummation of this

Settlement.

IV. Within fifteen (15) days after the deadline set by the Court for members of the class to respond to the notice of the proposed Settlement, the Class Representative may withdraw from the Settlement if, in his judgment, a substantial and material proportion of the class members object to the proposed Settlement.

V. The Settling Defendants shall not communicate directly or indirectly with members of the Plaintiff Class in Western Properties Limited Partnership with respect to this lawsuit without Plaintiffs' prior approval.

VI. This Settlement Agreement shall not be construed as or constitute a release by any Plaintiff of any claims or rights against any other defendant or other person. It is an express condition of this Settlement Agreement that such rights are specifically reserved fully and

completely as against all other defendants and all other persons.

VII. In the event that Settling Defendants fail to perform in good faith as required by this Agreement, or if Settling Defendants make misrepresentation or omissions of fact in their financial statements or affidavits submitted to Plaintiffs pursuant to paragraph I(b) of this Agreement, Plaintiffs shall have the right to rescind this Settlement Agreement upon motion to the Court in this litigation. Further, in the event that this Agreement is rescinded by Plaintiffs, the Settling Defendants shall be deemed to be defendants in this litigation as though the Settlement Agreement had never been consummated. In that event, Settling Defendants specifically waive their right, if any, to assert the statute of limitations, laches or any other defense based upon the passage of time, as a defense to

the further prosecution of this case against them.

VIII. In the event that this Agreement is not approved by the Court, is withdrawn or rescinded pursuant to paragraphs IV or VII respectively, this Agreement may not be used against Settling Defendants in the litigation of this case.

s/ Douglas E. Frank
Douglas E. Frank

s/ Michael H. Folb
Michael H. Folb

s/ Douglas E. Frank
Douglas E. Frank for
Doug Frank Development
Corporation

s/ Douglas E. Frank
for Western Properties
Limited Partnership

s/ Jay Herman
Jay Herman, Plaintiff

s/ Seymour Sacks
Seymour Sacks
Attorney for Settling Defendants

s/ Mark I. Harrison
Mark I. Harrison
Attorney for Plaintiffs

s/ Will B. Sandler
Will B. Sandler
Attorney for Plaintiffs

LODGED
April 7, 1977
Office of the Clerk
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

JAY HERMAN, Plaintiff, v. DOUG FRANK DEVELOPMENT CORP., et al., Defendants.	NO. CIV 74-803 PHX-WEC O R D E R

This matter having come before this Court for hearing on March 21 and 28, 1977, and upon plaintiff's motion requesting that this Court approve the partial settlement agreement (attached as Exhibit A) entered into between plaintiff and defendants Douglas E. Frank, Michael H. Folb, Doug Frank Development Company and Western Properties Limited Partnership, and having considered the briefs and memoranda submitted by all parties, this Court makes the following findings:

1. All members of the plaintiffs' class received proper notice of the partial settlement pursuant to this Court's order dated January 10, 1977;

2. Only one member of the class of 96 objected to the partial settlement agreement;

3. The partial settlement agreement, attached as Exhibit A, is fair, reasonable and in the best interests of

the plaintiff class;

4. The partial settlement agreement does not release or in any way adversely affect the plaintiffs' claims against the remaining non-settling defendants, United States Trust Company and Laventhol, Krekstein, Horwath & Horwath, which claims remain pending against said non-settling defendants.

NOW, THEREFORE, IT IS ORDERED that the partial settlement agreement, attached as Exhibit A, is approved and shall be binding upon all members of the plaintiff class.

The matter of Joseph E. Baird's motion for substitution of counsel and for dismissal of claims, dated February 8, 1977, submitted without request for oral argument, this Court, having reviewed Mr. Baird's motion, plaintiff's response and Mr. Baird's reply, finds as follows:

1. Joseph E. Baird received

proper notice of the class action pursuant to this Court's order of October 21, 1975;

2. Joseph E. Baird failed to notify the Court that he did not wish to be a member of the plaintiff class within the prescribed period ending December 5, 1975;

3. Joseph E. Baird is a member of the plaintiff class in this action pursuant to Rule 23, Fed. R. Civ. P., and is bound by the proceedings in this action.

NOW, THEREFORE, IT IS ORDERED denying Joseph E. Baird's motion for substitution of counsel and for dismissal of claims.

Further, the matter of Lionel P. Greenbaum and Ross B. Kenzie's motion to correct the record dated February 11, 1977, submitted without request for oral argument, this Court, having considered said motion, plaintiff's response,

settling defendants' response and Greenbaum and Kenzie's reply, finds as follows:

1. Messrs. Greenbaum and Kenzie received proper notice of the class action pursuant to this Court's order of October 21, 1975;

2. Messrs. Greenbaum and Kenzie failed to notify the Court that they did not wish to be members of the plaintiff class within the prescribed period ending December 5, 1975;

3. Messrs. Greenbaum and Kenzie are embers of the plaintiff class in this action pursuant to Rule 23, Fed. R. Civ. P., and are bound by the proceeding in this action.

NOW, THEREFORE, IT IS ORDERED denying Messrs. Greenbaum and Kenzie's motion to correct the record.

. . . .

DATED this 8th day of April, 1977.

s/ Walter E. Craig
Walter E. Craig, Judge
United States District Court
for the District of Arizona

FILED Dec 22, 1980
RICHARD H. DEANE
Clerk, U.S. Court
of Appeals

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAVENTHOL, KREKSTEIN, HORWATH & HORWATH, Defendant/Cross-claimant/Appellant, vs. ARNOLD M. HORWITCH, DOUGLAS E. FRANK and MICHAEL H. FOLB, WILLIAM MYERS, MILTON H. CORWIN, JOHN A. PIZER, and WALTR P. SIDERS, Defendants/Cross-Defendants/ Appellees.	Nos. 78-1296 78-1297 78-1298 78-1299
UNITED STATES TRUST COMPANY OF NEW YORK, Defendant/Cross-Claimant/Appellant, vs. DOUGLAS E. FRANK and MICHAEL H. FOLB, Defendants/Cross-Defendants/ Appellees.	No. 78-1397 D.C. No. CIV 74-803 OPINION

Appeal from the United States District Court for the District of Arizona
Walter E. Craig, District Judge, Presiding
Argued and submitted July 10, 1980

Before: MERRILL, GOODWIN and ANDERSON, Circuit Judges

MERRILL, Circuit Judge:

This case involves the sale of securities in the form of limited partnerships. On August 12, 1974, plaintiff Jay Herman filed suit on behalf of a class consisting of 95 investors who purchased limited partnerships in Western Properties Limited Partnership, pursuant to a prospectus and registration statement dated November 30, 1972. The complaint alleged that the registration statement filed with the Securities and Exchange Commission was false and misleading; that the prospectus under which the partnership interests were sold contained material misstatements of fact, omitted material facts, and contained misleading statements as to finances, project completions, and tax

status. it was alleged that the general partner of Western Properties, the Doug Frank Development Corporation (Frank Corporation), through its president, Douglas E. Frank, and its executive vice president, Michael H. Folb, intended to and did convert the proceeds of the offering for uses other than those stated in the prospectus. Plaintiffs alleged that "at least $2,000,000 has been misappropriated."

Among the defendants in the action were Western Properties, Frank Corporation, Frank, Folb, appellant United States Trust Company of New York (the Bank), alleged to be underwriter of the issue of partnership interests, and appellant Laventhol, Krekstein, Horwath & Horwath (the Accountants), alleged to be the accounting firm employed by the issuer, Western Properties, to prepare the registration statement.

The Bank and the Accountants filed cross claims against Frank and Folb, seeking contribution and indemnification. Frank and Folb were alleged by appellants to be in control of Frank Corporation and Western Properties.

On December 6, 1976, plaintiffs and defendants Western Properties, Frank Corporation, Frank and Folb moved for approval of a settlement agreement. Plaintiffs agreed to release all claims against Frank and Folb and Western Properties if the settling defendants would cooperate with plaintiffs in their case against the remaining defendants and pay plaintiffs $8,000 on account of costs. The settlement was approved by court order on February 10, 1977, and judgments against Frank and Folb have been entered in accordance with its terms.

Frank and Folb then moved for summary judgment on the cross claims of

appellants. The district court, without opinion, granted summary judgment dismissing the cross claims on December 13, 1977. Pursuant to Fed. R. Civ. P. 54(b), a certificate was filed by the district court and these appeals were taken by the Bank and the Accountants.[1] They were consolidated in this court. The liability of the Bank and the Accountants to the plaintiff class remains to be decided at trial.

The sole question on appeal is whether issues of fact remain to be tried bearing on the liability of Frank and Folb to the Bank and the Accountants for contribution and indemnity. Frank and Folb contend that as matter of law appellants have no right to contribution or indemnity. As to contribution, they contend that the law does not require contribution from persons situated as they were. We disagree.

Liability is established by the Securities Act of 1933, 15 U.S.C. § 77k(a). There, five classes of persons are made liable to the purchasers of securities for untrue statements or material omissions in a registration statement. This includes every person who signed the registration statement, every accountant who has, with his or her consent, been named as having prepared or certified any part of the statement, and every underwriter with respect to such securities. Under allegations of the Complaint Western Properties, the Bank, and the Accountants are all liable to the purchasers of the securities under § 77k(a).

Section 77k(f) provides a right of contribution. It reads:

> "All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every

> person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation."

Under this provision the Bank and the Accountants can recover contribution from any person who, if sued separately, would have been liable to make the same payment.

Appellees Frank and Folb are charged with liability as controlling persons whose liability is set forth in § 77o of the statute. Under that section they shall "be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the

existence of the facts by reason of which the liability of the controlled person is alleged to exist." The controlled person in this case is alleged to be Western Properties, liable under § 77k(a)(1) as the party who signed the registration statement.

Appellees makes several arguments to avoid liability for contribution. They contend first that nothing is said in § 77o respecting liability of controlling persons for contribution. Nothing need be said; § 77k(f) has said it all. Section 77o provides that Frank and Folb, as controlling persons, shall be liable jointly and severally with and to the same extent as Western Properties, and to any person to whom Western Properties is liable under § 77k. If this liability subjects Western Properties to contribution under § 77k(f), then Frank and Folb are likewise affected.

There can be no question that the

liability of the Bank, the Accountants, Western Properties, Frank and Folb is for the "same payment" under § 77k(f). This is payment for the same harm suffered by the purchasers resulting from the direct action of Frank and Folb, and from the negligence or oversight of the Bank and the Accountants in failing to discover the harmful conduct of Frank and Folb.

Had Frank and Folb not settled with the plaintiffs, the separate suit brought against them would have proceeded, and they would have been exposed to liability under § 77k to make the same payment for the same injury for which appellants may be held liable. That the settlement eliminated Frank's and Folb's liability to the plaintiff class does not affect their liability in contribution to appellants who were not parties to that settlement, nor does the settlement affect the identity of payment as between these

cross-defendants.

Appellees' final contention is that public policy favors settlement, and that to hold that contribution survives settlement would discourage parties from reaching settlements. We are unable to accept that argument as a general principle of securities regulation or as the deciding factor in this case.

By § 77k(f), Congress has expressed its preference between the sometimes conflicting values of settlement and contribution. A right of contribution is enunciated clearly there; the statute is silent as to the encouragement of settlements. Moreover, contribution strengthens the policy underlying the securities laws. As between the culpable parties, contribution reinforces the deterrent effect of the statute by pre-

venting one wrongdoer from unjustly escaping loss by shifting its responsibility to another wrongdoer liable for the same payment. Each party liable for the same payment must pay its proper share of that payment. Equally important, contribution gives the injured investor an extra measure of protection by broadening its potential source of reimbursement for damages. See Heizer Corp. v. Ross, 601 F.2d 330, 332 (7th Cir. 1979).

If it could be said that appellees' settlement with the plaintiff class had resulted in their bearing their proper share of damages, the case might be different. See Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 540 F.2d 27 (2d Cir. 1976). Clearly, however, the settlement did not accomplish this. In paying $8,000 on account of costs, and agreeing to cooperate with plaintiffs in their case against the remaining

defendants, appellees have not borne their fair share of what is due to the plaintiff class, if the allegations of the complaint are to be believed. It is not enough for appellees to earn their freedom from liability by assisting the plaintiff class in recovering from these appellants for their alleged error in placing faith too blindly in Frank and Folb.

We conclude that the court was in error in granting summary judgment on appellants' cross claims against Frank and Folb for contribution.

Plaintiff Herman also named as defendants certain individuals who, in addition to Frank and Folb, were officers or directors of the Frank Company: Appellees Horwitch, Myers, Corwin, Pizer and Siders. The Accountants cross claimed against them as well as against Frank and Folb. Summary judgment on the merits of the plaintiffs' claim has been entered in

favor of these appellees, establishing their freedom from liability to the plaintiff class. That judgment has become final. No longer can it be said that these appellees may become liable to make the same payment as that for which appellants may be found liable. The summary judgment on the Accountants' cross claim as to these appellees was not in error.

The cross claim for indemnity for the alleged violations of the Securities Act of 1933 was properly dismissed by the district court. In extending liability to underwriters and those who prepared misleading statements, the purpose of the Act is regulatory rather than compensatory, and permitting indemnity would undermine the statutory purpose of assuring diligent performance of duty and deterring negligence. See 3 L.Loss, Securities Regulation 1831 (1961 2d ed. & Supp. 1969). In Heizer Corp. v. Ross, supra, 601 F.2d at

334, the court stated:

> "Whereas contribution supports the policy of securities legislation, indemnification tends to frustrate and defeat it. A securities wrongdoer should not be permitted to escape loss by shifting his entire responsibility to another party. If indemnification were allowed, those found liable for the breach of a statutory obligation might escape liability as effectively as if contribution were denied."

Appellants also seek indemnity from appellees on two common law counts of plaintiffs' first amended complaint: Count IV, which alleges that the Bank is liable for having negligently failed to investigate Doug Frank and Western, or to discover the misappropriation, mismanagement, and fraud perpetrated on Western by Doug Frank, its officers and directors; and Count V, which alleges that the defendants' conduct "constitutes a breach of the common law principles of trust and fiduciary duty."

The parties do not dispute that state law governs the common law counts pendent to the federal securities claims. They cannot agree, nor has the trial court reached the issue, as to what local law applies. This is a determination we plainly cannot make on the limited record before us. Furthermore, even if we were to determine which state law applies (the parties suggest it is Arizona or New York law), there are unresolved factual issues as to the relationship between the parties which must be decided before an entitlement to indemnity can be established under the law of either of these states. See Busy Bee Buffet v. Ferrell, 82 Ariz. 192, 310 P.2d 817 (1957); Dole v. Dow Chemical Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

We conclude that dismissal of the pendent state claims was error in so far as it applies to Frank and Folb.

As to the five officer and director appellees other than Frank and Folb, this portion of the summary judgment is affirmed, since at the very least a party cannot be held liable for indemnity if it is adjudicated not liable for any wrongdoing. See generally Busy Bee Buffet v. Ferrell, supra; Margolin v. New York Life Insurance Co., 32 N.Y.2d 149, 297 N.E.2d 80, 344 N.Y.S.2d 336 (1973).

The order of the district court dismissing appellants' cross claim for indemnification of the federal securities violations is affirmed as to all appellees. The order dismissing the cross claim for contribution from appellees Frank and Folb is reversed. The order dismissing the cross claim for contribution from appellees Horwitch, Myers, Corwin, Pizer and Siders is affirmed. The order dismissing the cross claim for indemnification of the state claims as to

appellees Frank and Folb is reversed. The order dismissing the cross claim for indemnification of the state claims as to appellees Horwitch, Myers, Corwin, Pizer and Siders is affirmed. The case is remanded for trial which shall include any issues bearing on contribution as to appellees Frank and Folb and on indemnification of the state claims as to those appellees, as well as those bearing on the liability of those appellees to the plaintiff class.

FOOTNOTE

1. (Page 2) See Curtiss-Wright Corp. v. General Electric Co., ___ U.S. _____, 64 L.Ed.2d 1, 100 S.Ct. 1460 (1980) (substantial deference given to discretionary judgment of district court to enter Fed. R. Civ. P. 54(b) certificate).

FILED Feb 18, 1981
RICHARD H. DEANE
Clerk, U.S. Court of
Appeals

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAVENTHOL, KREKSTEIN, HORWATH & HORWATH, Defendant/Cross-Claimant/Appellant, vs. ARNOLD M. HORWITCH, DOUGLAS E. FRANK and MICHAEL H. FOLB, WILLIAM MYERS, MILTON H. CORWIN, JOHN A PIZER, and WALTER P. SIDERS, Defendants/Cross-Claimants/Appellees.	Nos. 78-1296 78-1297 78-1298 78-1299
UNITED STATES TRUST COMPANY OF NEW YORK, Defendant/Cross-Claimant/Appellant, vs. DOUGLAS E. FRANK and MICHAEL H. FOLB, Defendants/Cross-Defendants/Appellees	No. 78-1397 D.C. No. CIV 74-803 O R D E R

Before: MERRILL, GOODWIN and ANDERSON, Circuit Judges

The petition for rehearing of appellant Laventhol, Krekstein, Horwath & Horwath in the above matter is denied.

With regard to the petition of appellees Douglas E. Frank and Michael H. Folb, the panel has voted to deny the petition for rehearing. Judges Goodwin and Anderson have voted to reject the suggestion for a rehearing en banc and Judge Merrill has recommended such rejection.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing of Frank and Folb is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX B

15 U.S.C. § 77k

Civil liabilities on account of false registration statement

(a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue --

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the

time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof --

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased orrefused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice

that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting

to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not

believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a

material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

(d) If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the

registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the

time such suit was brought: Provided, that if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for

damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f) All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(g) In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

* * *

15 U.S.C. § 771

Civil liabilities arising in connection with prospectuses and communications

Any person who --

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and

who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

* * *

15 U.S.C. § 77o

Liability of controlling persons

Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an

agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 771 of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

* * *

15 U.S.C. § 77q

Fraudulent interstate transactions

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication

in interstate commerce or by the use of the mails, directly or indirectly --

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter,

investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 77c of this title shall not apply to the provisions of this section.

* * *

15 U.S.C. § 78j

Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange --

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

* * *

Rules and Regulations -
Securities Exchange Act of 1934

Rule 10b-5. Employment of Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

* * *

New York General Obligations Law

§ 15-108. Release or Covenant Not to Sue.

(a) Effect of release of or covenant not to sue tortfeasors. When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest.

(b) Release of tortfeasor. A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules.

(c) Waiver of contribution. A tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person.

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No. 80-1873

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

DOUGLAS E. FRANK and MICHAEL H. FOLB,

Petitioners,

v.

UNITED STATES TRUST COMPANY OF NEW YORK and LAVENTHOL, KREKSTEIN, HORWATH and HORWATH,

Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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UNITED STATES TRUST COMPANY OF NEW YORK and LAVENTHOL, KREKSTEIN, HORWATH and HORWATH

Respondents

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Laventhol, Krekstein, Horwarth and Horwarth opposes the petition for writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in the above

matter and entitled Laventhol, Krekstein, Horwarth & Horwarth v. Horwitch, 637 F.2d 672 (9th Cir. 1981) and urges the Court to deny the same.

QUESTION PRESENTED FOR REVIEW

Has the Opinion of the Ninth Circuit Court of Appeals created a conflict in decisions among the circuits or does its opinion improperly resolve an issue of such magnitude that it should be reviewed by this Court?

ARGUMENT

Petitioners introduce their argument by stating that the principal issue addressed in this case has not previously been heard by the Supreme Court, has not received consistent treatment in the circuit courts of appeals, and is of great significance in the field of federal

securities legislation.

It is true that the issue has not been addressed by this Court. However, it need not be, particularly when the facts of this case are examined. Petitioners have addressed the legal questions raised by them as though they existed in a vacuum. Their argument pitting contribution against settlement of securities cases fails to address those issues in the context of the specific facts of this case. Here, the complaint filed by the plaintiff alleged that at least $2,000,000.00 had been misappropriated by the defendants. The settlement between plaintiff and petitioners here was for the sum of $8,000.00 on account of costs and an agreement that the settling defendants would cooperate with the plaintiffs in their case against the remaining defendants. (Settlement agreement, ¶I(a), Appendix A, Page 5 to

Petition for Writ of Certiorari)

The Ninth Circuit Court of Appeals was clearly impressed with the insignificance of the settlement between petitioners and plaintiffs in the underlying case since it specifically recognized that if the settlement had resulted in petitioners "bearing their proper share of damages, the case might be different." 637 F.2d at 675.

Given the facts of this case, it does not require resolution by the Supreme Court of the United States.

As noted, petitioners assert that the contribution issue has not received consistent treatment among the circuit courts, but their brief totally fails to address the alleged conflict. Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 540 F.2d 27 (2d Cir. 1976) was asserted below as the case in conflict. The Ninth Circuit recognized that case and

specifically noted that the negligible amount of the settlement in this case distinguished it from the principle set forth in Herzfeld.

Petitioners argue that securities litigation requires that settlement be encouraged as opposed to contribution. Unfortunately for petitioners' position, though, the Securities Act of 1933, 15 U.S.C. §77k(f) recognizes the right of contribution and sets forth the applicable standard. If this Court were the Congress, petitioners' lobbying efforts might be worthwhile. The statute, though, is clear that contribution is to be permitted. Indeed, it has been recognized in Heizer Corporation v. Ross, 601 F.2d 330 (7th Cir. 1979) that contribution supports the policy of securities legislation. 601 F.2d at 334.

The opinion of the Ninth Circuit

which may entitle respondents to contribution from petitioners does not invalidate their settlement, but it does require petitioners to participate in a more proportionate share of the burden in any judgment entered against defendants.

Certiorari should be denied.

Respectfully submitted this 26th day of May, 1981.

O'CONNOR, CAVANAGH, ANDERSON,
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Vilma M. Morris
Notary Public

My com. expires:
August 9, 1981.

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CLERK

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OF THE UNITED STATES

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Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

Respondent United States Trust Company of New York's Brief Opposing Certiorari

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Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

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Respondent United States Trust Company of New York's Brief Opposing Certiorari

Respondent United States Trust Company of New York respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion, Laventhol, Krekstein, Horwath &

Horwath v. Horwitch, is reported at 637 F.2d 672.

STATEMENT OF THE CASE

Petioners' statement of the case is essentially correct, but it omits some pertinent facts.

Plaintiffs' amended complaint alleges that the Doug Frank Development Corporation (Frank Corporation), through its president Douglas E. Frank (Frank) and its executive vice president Michael H. Folb (Folb), intended to and did convert the proceeds of an offering of limited partnership interests in Western Properties Limited Partnership (Western Properties) to uses other than those stated in the prospectus, and that at least $2,000,000 have been misappropriated. 637 F.2d at 674. The amended complaint alleges further that the limited partnership

interests were purchased upon the recommendation, investment advice, and through the facilities of the United States Trust Company of New York (U.S. Trust) (Record on appeal (R.) 1566), and that U.S. Trust failed to investigate the Frank Corporation and Western Properties and was negligent in failing to discover the misappropriation, mismanagement, and fraud perpetrated by the Frank Corporation, its officers, and directors (R. 1572).

The amended complaint contains three counts based upon the federal securities laws and two counts based upon state common law (R. 1565-1574; Petition for Writ of Certiorari, page 4). Two of the three federal securities counts contain allegations of wrongdoing against all defendants, including Frank and Folb, while the third alleges wrongdoing against all except Laventhol, Krekstein, Horwath &

Horwath (Laventhol), the accounting firm employed by Western Properties to prepare the registration statement. One common law count is brought against U.S. Trust only, while the other is brought against all defendants.

As the Court of Appeals noted, the nature of the claims against the defendants was such that each defendant would, if found liable, be liable to the plaintiffs for the same payment, that is, "payment for the same harm suffered by the purchasers resulting from the direct action of Frank and Folb, and from the negligence or oversight of the Bank [U.S. Trust] and the accountants [Laventhol] in failing to discover the harmful conduct of Frank and Folb." 637 F.2d at 675.

After issue was joined, the class representative, Jay Herman, entered into a settlement agreement with Frank, Folb,

Western Properties, and the Frank Corporation, wherein, in consideration of Frank and Folb's agreeing to cooperate with plaintiffs in their case and to pay plaintiffs the sum of $8,000, plaintiffs agreed to deliver a release of all claims against Frank, Folb, and Western Properties, and a covenant not to execute on any judgment against the Frank Corporation (R. 2571-2572; Appendix A to Petition for Writ of Certiorari, pages 5-6).[1]

With leave of the district court, U.S. Trust subsequently filed its cross-

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[1] U.S. Trust, as a non-settling defendant without standing to object, did not oppose the settlement on the merits. Laventhol did oppose the settlement on the merits (R. 2683-2688). In response, plaintiffs took the position, supported by authorities, that, as a non-settling defendant, Laventhol did not have standing to object (R. 2700-2701).

claim against the Frank Corporation, Frank, and Folb.[2] The cross-claim alleges that Frank and Folb made representations to U.S. Trust concerning the operations and finances of the Frank Corporation and that to the extent U.S. Trust may be liable to plaintiff, such liability is the result of the representations, acts, omissions, negligence, breach of duty, and other tortious conduct on the part of the Frank Corporation, Frank, and Folb, without similar contributing acts of U.S. Trust (R. 2735-2736). The cross-claim seeks contribution or indemnification from the Frank Corporation, Frank, and Folb.

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[2] At the time of the hearing on the settlement, all parties were aware of U.S. Trust's claims against the cross-claim defendants as U.S. Trust had, by that time, filed its motion for leave to file a cross-claim.

ARGUMENT

Petitioners have demonstrated none of the grounds which constitute the special and important reasons specified in Rule 19 of the Rules of the Supreme Court for the granting of review on certiorari.

I. There is no conflict in the circuits on the question of contribution from settling defendants.

While petitioners may, as they assert in their petition, "believe that the Ninth Circuit has incorrectly decided the issue" (petition, page 10), their assertion that this issue "has not received consistent treatment in the circuits" (petition, pages 9-10) is not correct and they, in fact, fail to cite any circuit opinion on point.

Respondent is aware of only two circuit courts which have considered the

issue: the Second Circuit, in Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 540 F.2d 27 (2nd Cir. 1976), not discussed or mentioned by petitioners in their argument on this point, and the Ninth Circuit, in the instant case, 637 F.2d 672. The results in the two cases are not in conflict.

In Herzfeld, the plaintiff sought $510,000 in damages against Laventhol and other defendants for federal securities law violations and common law fraud. Plaintiff settled the action with, and released, all of the defendants other than Laventhol, for $357,000. The district court approved the settlement with the proviso that Laventhol could bring a third-party action against the settling defendants. 540 F.2d at 37. Laventhol did so, seeking contribution and indemnification from the settling defendants.

Certain defendants, the "Allen" defendants, against whom Laventhol was awarded contribution, appealed from the final judgment.

The Court of Appeals, after reviewing the evidence and noting factual differences between the liability of Laventhol and that of Allen to the plaintiff, concluded that the liability of Allen to the plaintiff had been extinguished by the $357,000 settlement, 540 F.2d at 38, and that even if the liability of Laventhol and Allen to the plaintiff was equal, on the pari delicto theory utilized by the district court, each would be liable for $255,000, or one-half of the total $510,000 claim of plaintiff. Allen, the Court of Appeals concluded, had by the settlement paid plaintiff $357,000, which was more than its share, and "far more than half of Herzfeld's [plaintiff's]

loss." 540 F.2d at 39. Allen, by paying more than its share to plaintiff, "had removed itself from the category of a tort-feasor defendant," 540 F.2d at 38, and Laventhol was not entitled to contribution from Allen.

The Ninth Circuit, addressing in the instant case petitioners' contention that a policy favoring settlement must override any policy favoring contribution, noted that "Congress has expressed its preference between the sometimes conflicting values of settlement and contribution. A right of contribution is enunciated clearly there; the statute is silent as to the encouragement of settlements." 637 F.2d at 675. The court, citing Herzfeld, observed that "[i]f it could be said that appellees' settlement with the plaintiff class had resulted in their bearing their proper share of damages, the

case might be different." 637 F.2d at 675. The court continued:

> "Clearly, however, the settlement did not accomplish this. In paying $8,000 on account of costs, and agreeing to cooperate with plaintiffs in their case against the remaining defendants, appellees [Frank and Folb] have not borne their fair share of what is due to the plaintiff class, if the allegations of the complaint are to be believed. It is not enough for appellees [Frank and Folb] to earn their freedom from liability by assisting the plaintiff class in recovering from these appellants [U.S. Trust and Laventhol] for their alleged error in placing faith too blindly in Frank and Folb." 637 F.2d at 675.

Because none of the criteria set forth in this Court's Rule 19 is met, petitioners devote most of their argument to the contention that "the appropriate analysis is to determine the policy of the appropriate state concerning contribution,

and then to determine whether a contribution action against the settling defendant is consistent with that policy . . . ." (petition, page 11).

The right to contribution in cases involving the federal securities laws, however, is governed by federal, not state, law.[3]

Further, petitioners' cited language from Stratton Group Ltd. v. Sprayregen, 466 F. Supp. 1180 (S.D.N.Y. 1979), concerning a "balance" between

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[3] Locafrance U.S. Corp. v. Intermodal Systems Leasing, Inc., 558 F.2d 1113 (2d Cir. 1977); Stella v. Kaiser, 221 F.2d 115 (2d Cir. 1955); Wassel v. Eglowsky, 399 F. Supp. 1330, 1367 (D. Md. 1975), aff'd 542 F.2d 1235 (4th Cir. 1976); Gould v. American-Hawaiian Steamship Company, 387 F. Supp. 163, 167 n.7 (D. Del. 1974); Altman v. Liberty Equities Corporation, 54 F.R.D. 620, 625 (S.D.N.Y. 1972); Globus, Inc. v. Law Research Service, Inc., 318 F. Supp. 955, 958 n.2 (S.D.N.Y. 1970), aff'd. on opinion below, 442 F.2d 1346 (2d Cir.), cert. denied, 404 U.S. 941 (1971).

federal and state policies (petition, pages 12-13), is from a footnote which constitutes pure dictum, the footnote being to a sentence in the text in which the district judge concludes that he "need not reach this interesting, albeit thorny, question for determination of the instant motion." 466 F. Supp. at 1189.

Gomes v. Brodhurst, 394 F.2d 465 (3rd Cir. 1967); Sabre Shipping Corporation v. American President Lines, 298 F. Supp. 1339 (S.D.N.Y. 1969); and Martello v. Hawley, 300 F.2d 721 (D.C. Cir. 1962), cited by petitioners, are all non-securities cases, which do not involve, as does the instant case, a statutory right to contribution.

Finally, Marshall v. Holiday Magic, Inc., 550 F.2d 1173 (9th Cir. 1977), and City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974), cited

by petitioners, concern the fairness of a settlement as to the plaintiff class, in the face of objections made by members of that class. They have nothing to do with the effect of settlement on the right of a non-settling defendant to contribution under the federal securities laws.

II. With respect to contribution by controlling persons, petitioners meet none of the criteria set forth in Rule 19.

The Court of Appeals rejected petitioners' contention that one held liable under the securities laws as a "controlling person" cannot be liable for contribution. The Ninth Circuit stated that:

> "Had Frank and Folb not settled with the plaintiffs, the separate suit brought against them would have proceeded, and they would have been exposed to liability under §77k to make the same payment for the same

> injury for which appellants may be held liable." 637 F.2d at 675.

As a result, the court concluded, Frank and Folb would be subject to liability for contribution under 15 U.S.C. section 77k(f) of the Securities Act of 1933. 637 F.2d at 675.

Petitioners argue that, in reaching this conclusion, "the court of appeals overlooked federal case law precisely on point." (petition, page 21). The only federal case law cited by petitioners, however, is a 1965 district court case, Shea v. Ungar, CCH Fed. Sec. L. Rep. ¶91,558 (S.D.N.Y. 1965), unreported officially, which did not, in any event, involve a claim under section 77k at all.

The decision of the Court of Appeals is not in conflict with decisions either of this Court or of other courts of appeal. It is, as noted by the Ninth

Circuit, 637 F.2d at 675, fully supported by the language of the securities acts themselves.

III. The Ninth Circuit has not, with respect to the right to indemnification under state law, decided any question of state law which should be decided by this Court.

There is no dispute that in certain limited situations respondents may be entitled to indemnity under whichever state's law is ultimately applied to the common law counts of plaintiff's complaint. The Court of Appeals simply held that "there are unresolved factual issues which must be decided before an entitlement to indemnity can be established under the law of either [New York or Arizona]." 637 F.2d at 676.

As the appeal to the Ninth Circuit followed the district court's granting of summary judgment, there has been no determination of those factual issues, no determination of whether indemnity is or is not available, and, as a result, no decision on a matter of state law which is ripe for adjudication by this Court.

IV. The issues raised do not demand this Court's consideration.

The issues raised by petitioners are not issues that "should be . . . settled by the Supreme Court" (petition, page 26) as petitioners assert. This action has not yet been tried, and the Court of Appeals has simply determined that the district court was in error in granting summary judgment.

Of the three issues raised by petitioners, one is a question of federal securities law concerning which there have, to date, been only two circuit level decisions, neither in conflict with the other; one is a question of federal securities law concerning which there have been no prior circuit level decisions; and one is a question of state law concerning which no conclusion has yet been reached in this case.

Petitioners' assertion of the urgency of the issues is belied by the dearth of circuit decisions. It is submitted that the considerations set forth in Rule 19 are not met and that the issues raised by petitioners should not be considered by this Court.

CONCLUSION

It is urged that the petition for writ of certiorari should be denied.

Respectfully submitted,

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THIS CASE RAISES AN ISSUE MERITING SUPREME COURT REVIEW.

Respondents seek to dissuade Supreme Court consideration of this case by attempting to trivialize the critical issue here presented. We believe this effort is unconvincing and that the Court ought to grant certiorari to address this question. The precise questions presented by this case are described in some detail in the Petition for Writ of Certiorari. This Reply will restrict itself to explaining the major reason why this case is especially appropriate for consideration by the Supreme Court.

No one need belabor the observation that the federal judiciary is struggling to administer an incredibly heavy caseload. A significant portion of that caseload involves federal securities cases. Moreover, the amount of judicial

resources consumed by these cases is disproporticnate to the number of cases, for securities litigation tends to be among the most complex and "big" of federal litigation. In addition, these cases very often, if not usually, involve multiple defendants claimed to be responsible for the alleged injury to the plaintiff.

The clear message sounded by the Ninth Circuit in this case is that, except in the most limited circumstances, a party gains virtually nothing through partial settlement of a securities law class action. Furthermore, we believe the Ninth Circuit's decision leaves the issue of settlement shrouded in an unnecessary and unfortunate uncertainty.

In view of the substantial impact of multi-party securities litigation, we believe that the interests of efficient federal case management could be significantly advanced by examining an opinion

that now effectively bars partial settlements of class actions. We believe that resolution of this matter would also serve important principles of federalism that have been unnecessarily sacrificed by the Ninth Circuit opinion.

In this case, several defendants in a securities law class action entered into a settlement agreement with plaintiffs. The settlement was conditioned upon approval by the district court and was so approved even though one of the non-settling defendants attacked the settlement as "unfair."

Notwithstanding the settlement, the Ninth Circuit, in reversing the federal district court, has said that the non-settling defendants may maintain contribution claims against the settling defendants. The effect of this ruling is, quite simply, to vitiate the incentive for such settlements and hence to prolong and

broaden the securities cases on the federal dockets. We strongly submit that this decision serves no legitimate legal purpose, but serves only to frustrate sound legal and administrative principles.

Respondents (as well as the Ninth Circuit) justify permitting contribution by the fact that the Securities Act of 1933 contains a provision authorizing contribution, whereas the statute makes no specific mention of encouraging settlements. We submit, however, that this observation is but the beginning of analysis, not the end of it.

It is certainly true that § 77k(v) describes the liability of securities defendants as "joint and several", and further provides that contribution is available "as in cases of contract." This provision, of course, clarifies that the common law tort prohibition against any contribution among joint tort-feasors will

play no role in securities litigations. But it certainly does not resolve the issue of what effect to accord to a settlement between plaintiffs and less than all defendants. That contribution is "available" (unlike the situation in the case of common law torts) does not excuse us from applying traditional legal analysis to resolve the issues presented by the appeal.

Under the Ninth Circuit decision, virtually no effect is accorded to the partial settlement. This result, we believe, cannot be justified under recognized legal principles and appropriate statutory policy. It is a state of affairs which ought not to be perpetuated.

In the Petition for Writ of Certiorari, we demonstrated that barring contribution would fully promote all identifiable policies, whereas permitting it served none.

We showed, for example, that applicable State law would favor denial of contribution in the case of a good faith partial settlement (Petition, page 13). Similarly, "federal common law" holds that a good faith settlement bars contribution (Petition, page 19).

In view of this unanimity of view, it was next necessary to inquire whether there is something distinctive about securities actions which requires a contrary result.* There is not.

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* In the Petition, we quoted from the case of Stratton Group Limited v. Sprayregen, 466 F.Supp. 1180, 1189, n. 11 (S.D.N.Y. 1979 (Petition, pages 12-13) which suggested the following functional analysis: In resolving the apparent conflict between contribution and the encouragement of settlements, the appropriate analysis is to determine the policy of the appropriate state concerning contribution, and then to determine whether a contribution action against the settling defendant is consistent with that policy, while at the same time assuring that the federal securities law policy of deterrence is adequately served. Respondents make no challenge to the sense or substance of that approach, but simply dismiss Stratton as dictum.

The Ninth Circuit has suggested that permitting contribution reinforces the deterrent effect of the securities law by preventing parties from "escaping loss." The Ninth Circuit also suggested that contribution gives the injured investor an extra measure of protection by broadening his potential sources of reimbursement. (637 F.2d at 675.) Neither reason can withstand analysis.

Defendants who enter into a good faith settlement with plaintiffs are not "escaping loss." Rather, they have had to make their peace with an arms-length plaintiff. If the settling defendants had not agreed to a price deemed appropriate by the plaintiff-investors, there would have been no settlement.* Moreover, far

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* Here, the plaintiffs carefully examined the financial condition of the settling defendants prior to consummating the settlement. Appendix A to Petition, page 11.

from affording the injured investor "an extra measure of protection by broadening its potential source of reimbursement for damages," the Ninth Circuit actually works to the disadvantage of plaintiff-investors. Surely, the position of a plaintiff-investor is advanced if he is permitted to reach accommodations which maximize the extent (and likelihood) of his ultimate recovery. Under the Ninth Circuit decision, however, plaintiffs will be unable to do this because the incentive for defendants to settle has been eliminated.

Having shown that all considerations militate strongly against permitting contribution in the case of a good faith settlement, we must once again ask why it was denied in this case. A careful reading of the Ninth Circuit opinion suggests that the overriding consideration is the fact that § 77k(v) contains the language

that contribution is available "as in cases of contract." This brings us directly to the conflict between the Ninth Circuit and Second Circuit in their analysis of the impact of settlement on contribution. The Second Circuit decision in Herzfeld v. Laventhol, Krekstein, Horwath and Horwath, 540 F.2d 27 (2d Cir. 1976) directly contravenes the rationale of the Ninth Circuit in this case.

In Herzfeld, plaintiff brought securities law claims against Laventhol and various other parties. The defendants other than Laventhol settled with plaintiff for $357,000. Laventhol then brought a third-party action for indemnity and contribution against the settling defendants. At trial, the district court found Laventhol liable for an additional $153,000. The court also found that Laventhol was entitled to pro rata contribution from the defendant Allen & Company in the amount of one-half of $153,000.

On appeal, the Second Circuit ruled that the settlement barred the claim for contribution. The court found that, by its settlement, the settling party "removed itself from the category of a tort-feasor defendant." Id. at 38. The court thus concluded that by virtue of the settlement, Allen & Company could not be a defendant in an action by plaintiff - and thus could not be considered a "joint feasor" vis-a-vis plaintiff in the suit. Id. at 39. Since contribution unquestionably requires that the party against whom contribution is sought be a "joint-feasor" with the party seeking contribution,* the court overturned the contribution award.

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* It is recognized that contribution under the securities law, like contribution under common law, requires that the party against whom contribution is sought be a joint wrongdoer vis-a-vis the claims alleged by plaintiff. See, e.g., Index Fund, Inc. v. Hagopian, 471 F.Supp. 738, 746, n. 6

[footnote continued on next page]

Respondents assert that Herzfeld is not applicable to our facts because petitioners have not paid enough in their settlement with plaintiffs. In so arguing, respondents simply choose to ignore the Second Court's legal theory that contribution is not available as to defendants who, by virtue of the settlement, can no longer be considered a wrongdoer as to the plaintiff. This decision of Herzfeld was reached notwithstanding that

[Continuation of footnote]

* (S.D.N.Y. 1976) ("although contribution in Rule 10b-5 securities cases, as well as common law fraud cases has been authorized, that right has so far been limited to recovery among joint tort-feasors."); Wassel v. Eglowsky, 399 F.Supp. 1330, 1367 (D.Md. 1975), aff'd 542 F.2d 1235 (4th Cir. 1976) ("The necessary predicate for a contribution recovery is that the party it is recovered from be a 'joint tort-feasor', i.e., that he be 'liable in tort to the same person for the same harm'" (citing Restatement 2d of Torts, § 886A).); Herzfeld v. Laventhol, Krekstein, Horwath and Horwath, 540 F.2d 27, 38-9 (2nd Cir. 1976).

the securities statute therein involved provided for contribution.* Instead of following the legal ratio decidendi of Herzfeld, the Ninth Circuit has embarked upon a vague "numbers game" in resolving contribution claims. Just how much, it must be asked, must a defendant pay before he no longer is to be considered a tort-feasor vis-a-vis the plaintiff? What is the "fair share" to which the Ninth Circuit refers? For example, would respondent Frank in this case have to pay one-half (i.e., one-half each for Frank and

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* As noted above, Section 78k(v) clarifies that the common law bar against contribution of joint tort-feasors is inapplicable to securities cases. The provision does not speak to the issue of settlement by one of the alleged tort-feasors, and the Herzfeld case clearly holds that a contribution provision does not have the absolute application accorded to it by respondents and the Ninth Circuit.

U.S. Trust) of the amount claimed by plaintiff before he loses the status of joint feasor? Or, would one-third of the total be enough since Folb is also a cross-defendant and contribution is usually awarded on a pro rata basis in securities cases?* Perhaps it should be one-fourth of the total since Laventhol might also share in this liability; or, in view of the cross-claims against Corwin, Pizer, Siders, Horwitch and Myers, maybe

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* "'The only workable rule to apply ... is the one of pro rata contribution. ... On the whole, judged by administrative expediency, this is probably as simple and as satisfactory a way to handle the matter as any. To resort to fault, compensation, or extent of participation would be even more confusing.'" 3 L. Loss, Securities Regulation, at 1738, quoting with approval Douglas & Bates, "The Federal Securities Act of 1933," 43 Yale L.J. 171, 178-181 (1933).

it should be one-ninth of the alleged damage.* What would the number be if "control persons" of Laventhol and U.S. Trust were brought into the action?

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* We note that the Ninth Circuit's treatment of the case of the additional directors evidences internal inconsistency on the issue of contribution. The above-named directors had obtained a summary judgment against plaintiffs. The Ninth Circuit thus affirmed the dismissal of the cross-claim against them because "no longer can it be said that these appellees may become liable to make the same payment as that for which appellants may be found liable," 637 F.2d at 676. But in light of the settlement between plaintiffs and petitioners, the very same thing should be said of petitioners. And if, as suggested by respondents and the Ninth Circuit, § 77k(v) affords a right to a defendant that cannot be vitiated by the acts of plaintiffs, should not the non-settling defendants be afforded the right to establish the liability of such parties for contribution purposes? That would be part of their contribution claim in any event. What justification is there to accept the plaintiff's conduct in opposing the motion for summary judgment but ignoring such conduct in settling the action?

Indeed, if one looks at the facts of the Herzfeld case, the same type of numerical uncertainty would have been involved if the Second Circuit had accepted the position espoused by respondents. Laventhol was but one of the twelve defendants sued by Herzfeld, 540 F.2d at 28. Laventhol, however, would up paying approximately 30% of the damages ($153,000 of $510,000) rather than a pro rata amount of 8-1/3% (1/12). True, Allen & Company paid more than half of the amount due to plaintiff ($357,000 of $510,000), but this payment was made on behalf of all of the other defendants, Id. at 27. Thus it is clear that the settling group in total paid less than its pro rata share, and Laventhol wound up paying more. But surely this is a chance that a party takes in choosing not to settle. If Laventhol had prevailed on the merits, it would have

wound up paying nothing at all to plaintiff, whereas plaintiff would have kept the consideration received from the settling defendants. Similarly, if respondents prevail in the main action against plaintiffs, they pay nothing; but the consideration paid by petitioners to plaintiff (as in any settlement) is never returned. Surely nothing would more severely undermine the strong federal policy in favor of settlement of securities law cases then to shroud the effect of settlement in this fog of numerical uncertainty. (i.e., What percentage of a claim must a defendant pay to buy his final peace in a securities law litigation?)

Moreover, where, as here, and in many other cases, a substantial portion of the consideration flowing to plaintiff is non-cash in nature, must the courts engage in thorny valuation problems to gauge the worth of the settlement? As previously

shown, petitioners agreed in the settlement to assist in the development of facts relating to plaintiff's case, including the searching for and identification of voluminous records, both in and out of the custody of plaintiff, and the spending of substantial time of petitioners and their counsel on exploration of various aspects of the case. What dollar value is to be put on this?

Plain logic as well as law dictates that either a good faith settlement eliminates one's status as a potential joint tort-feasor for purposes of contribution (without regard to the precise amount paid) or it does not . We believe that logic, policy and the above-described law should lead this Court to conclude that a settlement <u>does eliminate</u> a defendant's status as a joint tort-feasor and that it should bar the claims for contribution asserted in this case.

In summary, we believe that the Ninth Circuit decision, if permitted to stand, will effectively deter partial settlements of securities law actions.*

We believe that the decision of the Ninth Circuit is unsound and that it is important for the Supreme Court to examine this important issue at the present time.

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* Respondent U.S. Trust suggests that this Court ought to wait until there are more circuit opinions on the issue before addressing the problem. This is not a realistic suggestion. Given the Ninth Circuit decision, there will be few, if any, securities law defendants willing to partially settle a securities case. Hence, we believe that now, not later, is the appropriate time to address this matter.

RESPECTFULLY SUBMITTED this 2 day of June, 1981.

DUSHOFF & SACKS

By _____
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and

By _____
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Douglas E. Frank and
Michael H. Folb

CERTIFICATE OF SERVICE

I, Allan J. Kasen, one of the attorneys for Douglas E. Frank and Michael H. Folb, petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2 day of June, 1981, I deposited in a United States mailbox located at 111 W. Monroe, Phoenix, Arizona, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, an original and 40 copies of the foregoing "Petitioners' Reply Brief in Support of Their Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit", and I further certify that three copies of the said document were similarly mailed on said date to each of the following counsel:

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